AUN HUAT & BROTHERS SDN BHD & ORS

v.

SIME DARBY BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
KANG HWEE GEE J
[ORIGINATING SUMMONS NO: D5-24-22-1999]
2 JUNE 2003

COMPANY LAW: *Mergers and takeovers - Underlying principles - Mandatory general offer by controlling shareholders - Obligations thereof not discharged - Whether minority shareholders had private cause of action - Securities Commission Act 1993 ss. 15, 33 - Banking and Financial Institutions Act 1989 ss. 45, 46, 49, 118 - Takeovers and Mergers Code 1987 r. 34*

ADMINISTRATIVE LAW: *Judicial review - Statutory authority - Banking - Mergers and Takeovers - Decision of Bank Negara purporting to withdraw consent granted to defendants by Ministry of Finance - Whether acting outside limit of jurisdiction - Whether ultra vires - Whether subject to judicial review - Legitimate expectation - Wednesbury unreasonableness - Applicability*

The defendants had acquired 60.35% of the issued shares of a banking group called the United Malayan Banking Corporation ('the UMBC'). The acquisition had triggered r. 34 of the Take-Overs and Mergers Code 1987 which obliged the defendants to make a mandatory general offer ('MGO') to acquire the remaining shares of the other shareholders, including those shares that were individually owned by the plaintiffs. In consonence thereof, the defendant offered to purchase the said plaintiffs' shares at the acquisition price of RM6.46 per share. Subsequently, however, the defendant had to back down from the intended acquisition due to the economic downturn in 1997. It was apparent that the MGO itself had undergone a reversal of approval and disapproval by the Central Bank, the Bank Negara. The facts also showed that the defendants, upon the obtaining circumstances, had to dispose off their entire shareholding in UMBC to Rashid Hussein Berhad (without implementing the MGO on the terms which had been approved by the Securities Commission and the Ministry of Finance). The plaintiffs, who had not been availed of any opportunity to air their grievances on the decision to disapprove the MGO, and who held between them some 5.01% of the issued and paid up voting shares of UMBC, brought the present action claiming, *inter alia*, injunction and damages against the defendants. The primary issues that arose were: (i) whether the plaintiffs

on the facts and in the circumtances could be said to have had a sustainable cause of action against the defendants; and (ii) whether Bank Negara's act in withdrawing the approval on the MGO was *ultra vires*.

Held (allowing the action and the relief sought):

[1] The plaintiffs must show that the conduct of the defendants in failing to make the mandatory general offer was in law an actionable wrong because it violated their recognized right under the Securities Commission Act 1993 read with the Take-Overs and Mergers Code 1987. The plaintiffs must establish that there was a breach of statutory duty on the part of the defendants in failing to make the MGO which in turn gave them the right to a private cause of action. (pp 45 h & 46 a)

[2] The underlying objective of the MGO is to achieve equity between the remaining shareholders of the offeree company and those shareholders from whom the acquirer had purchased the shares. By this route, it gives the remaining shareholders an opportunity either to accept the rewards of the mandatory offer and thus make an exit from the company or to remain with the company with the new controller. (p 51 e-f)

[3] Section 33(10) of the Securities Commission Act empowers the Securities Commission to invoke sanctions such as a private reprimand, a public censure etc. as it deems fit. The public censure provision serves to convey the disapproval of the Securities Commission as a regulatory body of the errant acquirer on the one hand, and on the other, to put its integrity on notice to the investing community at large. It also serves the purpose of notifying the persons aggrieved and providing them with a starting point to consider whether to commence a civil action to enforce their right. The plaintiffs therefore had a private cause of action. (p 52 a-c)

[4] The functions of Bank Negara under the Banking and Financial Institutions Act 1989 was purely to transmit the application of the defendants to the Ministry of Finance with its recommendation and not to take upon itself the task of making the decision. This was made clear by s. 45(2) of the Act read together with ss. 49(5), 49(1) and 118 thereof. (pp 58 i & 59 a-d)

[4a] Where a statutory body acts outside the limit of its jurisdiction such as in the instant case, it is acting *ultra vires* and regardless of motive, its act was unlawful. (p 59 e)

[5] The plaintiffs' legitimate expectation in the instant case was sufficiently well entrenched as to amount to almost a right and was substantial enough to require a right to be heard before a decision was made on the MGO - for the re-imposition of a restriction on the defendants to undertake the MGO would have the effect of releasing the defendants from having to perform their statutory obligation under the law and consequently depriving the plaintiff permanently of their right to the MGO. The fact that the right had been vested in the plaintiffs since 22 April 1996, coupled with the fact that the decision of the Ministry of Finance with respect to the approval of the MGO had undergone a reversal of approval and disapproval made it all the more necessary that the plaintiff be afforded the opportunity to be heard before a decision was made to revoke the approval. (p 64 a-c)

[5a] The failure to consider the plaintiffs' legitimate expectation in this instance constitutes a failure to consider a relevant consideration thereby subjecting the decision to judicial review on ground of 'procedural impropriety' or what is now referred to as 'Wednesbury unreasonableness'. (p 64 d)

Case(s) referred to:

Carltona Ltd. v. Commissioners of Works [1943] 2 All ER 560 ***(dist)***

Chin Yew Loy Holdings Sdn Bhd v. AU Metalvest (M) Sdn Bhd [2002] 6 CLJ 141 HC ***(refd)***

Civil Service Unions & Ors v. Minister for Civil Service [1985] AC 374 ***(refd)***

Credit Suisse v. Allerdale Borough Council [1996] 4 All ER 129 ***(cit)***

Francis v. Municipal Councillors of Kuala Lumpur [1962] MLJ 407 ***(refd)***

Ganad Media Sdn Bhd v. Dato' Bandar Kuala Lumpur (No 1) [2002] 1 CLJ 700 HC ***(dist)***

Karuppan Bhoomidas v. Port of Singapore Authority [1978] 1 MLJ 49 ***(refd)***

Lonrho Ltd v. Shell Petroleum Co Ltd & Ors (No 2) 1982 A.C. 173 ***(refd)***

Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan [1999] 3 CLJ 65 FC ***(foll)***

Mohamed Noor v. Universiti Teknologi Malaysia [1981] 2 MLJ 196 ***(refd)***

Monk v. Warbey [1935] 1 KB 75 ***(refd)***

Petaling Tin Berhad v. Lee Kian Chan [1994] 2 CLJ 346 SC ***(foll)***

Phillips v. Britannia Hygienic Laundry Co Ltd [1923] 1 KB 539 ***(refd)***

R Rama Chandran v. The Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***

Tan Chye Choo & Ors v. Chong Kew Moi [1966] 2 MLJ 4 ***(refd)***

Wu Siew Ying v. Gunung Tunggal Quarry & Construction Sdn Bhd & Ors [1999] 4 CLJ 339 ***(cit)***

Legislation referred to:
Banking and Financial Institutions Act 1989, ss. 45, 46, 49, 118
Companies Act 1965, s. 179(7A)
Motor Vehicles (Construction and Use) Rules 1959, r. 94
Securities Commission Act 1993, ss. 15, 33
Take-Overs and Mergers Code 1987, rr. 34(1), 34.1(1), (7)
Town and Country Planning Act 1976, s. 24

Road Traffic Act 1930 [UK], s. 35(1)

Other source(s) referred to:
de Smith, *Judicial Review of Administrative Action*, 5th edn, para 13-34
Loh Siew Cheng, *Corporate Powers*, 1996 edn, p 375, 2002 edn, p 841
MP Jain, *Administrative Law of Malaysia and Singapore*, 2nd edn, p 346

Suit No D5-24-22-99
For the plaintiff - Millie Chan Wai Yen (R Jayasingam & Reena Kaura Chuah; M/s WY Chan & Roy

For the defendants - Robert Lazar (G Rajasingam & RS Nathan); M/s Shearn Delamore & Co

Suit No D4-24-163-99
For the plaintiff - Ranjit Singh (Richard Yeoh Kar Hoe & Ooi Huey Ling); M/s Abdul Aziz, Ong & Co

For the defendants - Robert Lazar (G Rajasingam & RS Nathan); M/s Shearn Delamore & Co

Reported by Mariette Peters-Goh/WA Sharif

JUDGMENT

Kang Hwee Gee J:

Originating Summons D5-24-22-1999 consolidated with D4-24-163-1999
The summons require the determination of issues across a broad spectrum of legal principles. The chronological narrative however, is not in dispute and may be summarised as follows:

In The Beginning
The plaintiffs were individual minority shareholders of United Malayan Banking Corporation Berhad (UMBC) a public unlisted company. Between them the plaintiffs held 5.01% of the issued and paid up voting shares of UMBC.

The controlling shareholders of UMBC at the material time, were Dato' Keramat Holdings Bhd and its wholly owned subsidiary UMBC Holdings Sdn Bhd (the UMBC group). Collectively they held 201,168,890 ordinary shares of UMBC representing 60.35% of the issued and paid up voting shares of UMBC.

The other substantial shareholders were Petroleum Nasional Bhd (Petronas) and Perbadanan Nasional Bhd (Pernas). Between them they held some 30% of the issued and paid up voting shares of UMBC.

The 1st defendant, Sime Darby Bhd and its wholly owned subsidiary, the 2nd defendant Sime Darby Financial Services Holdings Sdn Bhd (Sime Darby Group) were desirous of acquiring the entire issued and paid up voting shares of UMBC from the UMBC group.

As UMBC was a commercial bank the prior written approval of the Minister of Finance (MOF) would have to be obtained first, under s. 45 of the Banking and Financial Institution Act 1989 (BAFIA) to enter into an agreement or arrangement to acquire 5% or more of its shares; second, under s. 46 for approval to hold more than 20% of its shares; third, under s. 49 for approval to enter into an agreement or arrangement which would result in the change in its control, the sale, disposal or transfer of its business, its amalgamation, merger or reconstruction; and generally under s. 118 for any exemption from the application of any of the provisions of the Act.

Additionally, the approval of the Foreign Investment Committee would also have to be obtained, but this was not in issue as its approval was obtained later in the course of the acquisition.

On 10 November 1995 the defendants obtained the approval of the Minister of Finance (MOF) granting,

(a) the 1st defendant to acquire and hold 60.35% of the issued capital of UMBC;

(b) the 1st defendant, the 2nd defendant (then known as Sime Communications Sdn Bhd), SD Holdings Bhd (the 2nd defendant's immediate holding company) and Permodalan Nasional Berhad pursuant to s. 118 of BAFIA, to hold an interest in UMBC shares over and above the limits set down under s. 46 of BAFIA.

Following the approval, on 11 November 1995 the 1st defendant announced that the Sime Darby Group had entered into a Conditional Share Sale

Agreement with the UMBC group to acquire their entire shareholding of 60.35% in UMBC for a cash consideration of RM1,300,000,000, that is to say at approximately RM6.46 per share.

On 18 January 1996 however, Bank Negara informed the defendants by letter that the MOF would not allow them to acquire any additional shares of UMBC over and above the permitted 60.35% approved earlier. In consequence thereof, on 20 January 1996 the defendants through their adviser Amanah Merchant Bank (Amanah) applied to the Securities Commission (SC) to waive the requirement of having to make the mandatory general offer (MGO) which they were liable to under r. 34.1 of the 1987 Code for the remaining shares in UMBC should they proceed to complete the acquisition.

The SC by a letter dated 16 February 1996 rejected the defendants' application but intimated that it would be prepared to consider a restricted MGO on the shareholdings of a number of private non institutional investors who were essentially the plaintiffs in the present proceeding holding between them approximately 5.01% of the issued shares of UMBC.

Accordingly, on 28 March 1996, the defendants through Amanah made another application to the SC on the term as suggested.

The defendants received a favourable reply from the SC on 19/4/1996 approving their application to make a restricted MGO for 16,713,554 ordinary shares of UMBC (representing the 5.01% shareholding of the private individual shareholders, in essence the plaintiffs) at the price of RM6.46 per share.

Three days after receiving the approval from the SC the defendants proceeded to acquire the 60.35% issued shares of the UMBC group as they had intended.

The acquisition triggered r. 34.1(a) of the 1987 Code on Take-Overs and Mergers, which obliged the defendants to make a mandatory general offer (MGO) to acquire the remaining shares of the other shareholders that they did not own at the acquisition price of RM6.46 per share.

Rule 34.1 of the 1987 Code on Take-Overs and Mergers read as follows:

> 34.1 Except with the consent of the Panel, or unless otherwise directed by the Panel where:
>
> (a) any person acquires, whether by a series of transactions over a period of time or not, shares which (taken together with shares held or acquired by persons acting in concert with him) carry more than 33% of the voting rights of a company; or

(b) any person who, together with persons acting in concert with him, holds not less than 33% but not more than 50% of the voting rights and such person, or any person acting in concert with him, acquires in any period of 12 months additional shares carrying more than 2% of the voting rights, such person shall extend within a reasonable period of time an offer on the basis set out below to the holders of any class of share capital which carries votes and in which such person or persons acting in concert hold shares. In addition to such person, each of the principal members of the group of persons acting in concert may, according to the circumstances of the case, have the obligation to extend an offer."

After the acquisition UMBC changed its name to Sime Bank Berhad, but for convenience for the purpose of this judgment, the original name of the bank UMBC will be retained.

The Events Subsequent

No time limit was prescribed within which the MGO had to be performed save that under r. 34(1) of the Code it must be made "within a reasonable period of time". But after having completed the acquisition, the defendants did not act to commence the MGO.

On 1 August 1996 they wrote through their adviser Amanah to the SC to seek guidance as to how they should implement the MGO. But it was only on 3 October 1997 did they provide the SC with an outline of their plan as to how they proposed to make the MGO for the remaining shares in UMBC. They proposed a scheme to undertake the MGO in the following manner:

a) The general offer was to be implemented by placing the entire share capital in UMBC on a new company called Prolayer Holdings Berhad;

b) The minority shareholders of UMBC could then at their option choose whether to take up the new shares in Prolayer or to accept a cash offer of the UMBC shares that they hold.

On 3 October 1997 the 1st and 2nd defendants through their adviser Amanah wrote to Bank Negara, outlining the terms of the Prolayar proposal. In addition, they sought the approval of the MOF under ss. 45 and 49, *inter alia*, to allow the 1st defendant and its subsidiary Consolidated Plantations Berhad through the 2nd defendant to acquire the remaining 39.65% of the issued and paid up capital of UMBC not held by them.

The proposal was approved by the MOF through Bank Negara within two weeks on 17 October 1997.

The SC approved it three days later on 20 October 1997 although at first it turned down a request for a waiver that the defendants be exempted from providing the profit forecast for Prolayar. At a meeting on 3 December 1997 however this requirement was waived thereby setting the stage for the defendants to discharge its statutory duty to make the MGO of the plaintiffs' 5.01% shareholding.

The Events Thereafter

The sudden economic downturn of 1997 had come to grip. The defendants were caught and were unable to perform what they had set upon to do. On 26 December 1997 their adviser Amanah wrote to the SC again, this time to defer the proposed offer and to request the SC to consider a revised offer. Amanah followed up its request to the SC by another letter dated 14 January 1998 providing therein some additional justification for seeking to revise the terms of the offer.

On 10 March 1998 the 1st defendant announced that it had disposed of its entire 60.35% shareholding in UMBC (which by now was known as Sime Bank Berhad) to Rashid Hussein Berhad without implementing the MGO on the terms which had been approved by both SC and MOF.

On 31 March 1998, the SC wrote to the defendants giving the defendants 14 days to explain what course the 1st and 2nd defendants proposed to take on the MGO which the SC had restricted to apply to the 5.01% shareholding of the minority individual shareholders.

Upon receiving the letter from the SC the defendants by a letter dated 3 April 1998 sought the view of Bank Negara on the implication of the letter of the SC, requesting it to advise them on the applicability of the restriction imposed upon them earlier on 18 January 1996 with respect to the acquisition of more UMBC shares.

In response Bank Negara by a letter to the defendants dated 9 April 1998 informed the defendants that it had withdrawn its 17 October 1997 approval of the defendants' acquisition of the balance of 39.65% shareholding in UMBC through the Prolayar scheme. By the same letter Bank Negara stated that the restriction that it originally imposed on 18 January 1996 prohibiting the defendants from acquiring any more shares of UMBC other than the 60.35% that had been approved was still in force. The contents and the legal implication of this letter will be examined in due course.

The decision of BNM was conveyed to the SC by letter dated 13 April 1998 by the defendants' adviser Amanah.

By a letter dated 12 May 1998, the SC wrote to the 1st defendant reiterating the 1st defendant's obligation to carry out the MGO. The 1st defendant was asked to show cause within 14 days why action should not be taken against it under s. 33(10) of the Securities Commission Act 1993 in respect of its failure to carry out the MGO.

The 1st defendant replied by a letter dated 22 May 1998 explaining the reasons why the MGO had not and could not be implemented. In substance it blamed the economic downturn for not being able to comply with the requirement of r. 34.1 of the 1987 Code.

The SC did not accept the defendants' explanation.

On 17 July 1998 it issued a public reprimand under s. 33(10) of the Act (then in force) wherein the SC also made it clear that the censure notwithstanding, the defendants were still obliged to make the MGO. It also expressed its view that under s. 33(9) of the SCA an aggrieved party would be entitled to commence legal proceeding against the defendants. The letter read as follows:

Suruhanjaya Sekuriti

Ruj. Kami: SC/TOM/24 Vol. 1

Tarikh: 7 Julai, 1998

Lembaga Pengarah-Pengarah
Sime Darby Berhad
Tingkat 21, Wisma Sime Darby
Jalan Raja Laut
50350 Kuala Lumpur.

Tuan,

SIME BANK BERHAD (SIME BANK) - Tawaran Am Mandatori Ke Atas Baki Hak Mengundi Dalam Sime Bank

Kami merujuk kepada penjelasan pihak tuan bertarikh 22 Mei 1998, berhubung dengan kegagalan Sime Darby untuk melaksanakan tawaran am mandatori ke atas baki hak mengundi di dalam Sime Bank di bawah Kaedah 34.1(a), Kod Malaysia Mengenai Pengambilalihan dan Percantuman, 1987 (Kod Malaysia). Penjelasan pihak tuan tersebut adalah berhubung dengan surat tunjuk-sebab yang dihantar oleh pihak kami pada 12 Mei 1998.

1. Adalah dimaklumkan bahawa penjelasan yang diberikan oleh pihak tuan tersebut, iaitu keadaan ekonomi yang tidak sesuai dan masalah kewangan Sime Bank dan Sime Securities Sdn Bhd telah menghalang Sime Darby daripada melaksanakan obligasinya, tidak dapat diterima oleh pihak kami.

Sehubungan dengan ini, pihak kami telah membuat keputusan untuk mengenakan celaan awam kepada Sime Darby dan para pengarahnya yang bertanggungjawab bagi pengambilalihan Sime Bank. Celaan awam ini dikenakan kepada Sime Darby dan para pengarahnya yang relevan pada masa itu kerana tidak menunjukkan sikap yang bersungguh-sungguh bagi melaksanakan obligasi tawaran am mandatori tersebut. Bersama-sama ini disertakan satu salinan celaan awam tersebut untuk makluman pihak tuan.

2. Sila ambil maklum bahawa walau pun celaan awam telah dikenakan ke atas Sime Darby dan para pengarahnya, obligasi tawaran am mandatori ke atas baki hak mengundi dalam Sime Bank yang berkenaan masih lagi wujud. Berhubung dengan keputusan kami ini, seperti yang diperuntukkan di bawah Seksyen 33(9) Akta Suruhanjaya Sekuriti 1993, pihak-pihak yang mengalami kerugian berhubung dengan kegagalan melaksanakan obligasi tawaran am mandatori tersebut boleh mengambil tindakan terhadap pihak tuan.

Yang benar,

t.t.
DATO' DR. MOHD MUNIR ABDUL MAJID
Pengerusi.

The relief sought

The defendants failed to make the MGO and consequently, the plaintiffs filed these originating summons seeking the following relief:

(1) A declaration that the first defendant (acting in concert with or through the second defendant) and the second defendant have a legal duty to extend an offer to the plaintiffs to acquire the number of ordinary shares of RM1-each in Sime Bank Berhad ("Sime Bank") owned by the plaintiffs and more particularly enumerated in the Schedule hereunder ("the Mandatory Offer") at the offer price of not less than RM6.46 for each ordinary share, such Mandatory Offer to be made in accordance with the Securities Commission Act 1993 ("the Act") and the Malaysian Code on Take-Overs and Mergers 1987/1998 ("the Code");

(2) An order that the first defendant (acting in concert with or through the second defendant) and the second defendant do forthwith extend the mandatory offer to the plaintiffs in accordance with the Act and the Code;

(3) An injunction to restrain the first defendant (acting in concert with or through the second defendant) and the second defendant whether by themselves or by their directors, agents or servants or otherwise howsoever from exercising the voting rights attached to the voting shares in Sime Bank which have been acquired by them until the offer document for the Mandatory Offer has been posted to the plaintiffs in accordance with the

Code AND an Injunction to restrain Sime Bank whether by itself or by its directors, agents or servants or otherwise howsoever from accepting or giving effect to the votes in the event of such exercise;

(4) An injunction to restrain the first defendant (acting in concert with or through the second defendant) and the second defendant whether by themselves or by their directors, agents or servants or otherwise howsoever from selling or transferring any voting shares in Sime Bank during the offer period (as defined in the Code) AND an injunction to restrain Sime Bank whether by itself or by its directors, agents or servants or otherwise howsoever from accepting or giving effect to the transaction in the event of such sale or transfer;

(5) Damages against the first defendant and the second defendant *in lieu* of, or in addition to, the aforesaid orders (2), (3) and/or (4);

(6) Costs against the first defendant and the second defendant; and

(7) Such further or other Order or relief as this Honourable Court may think just and expedient.

The Present Position And Relief Now Being Sought

The sale of the entire UMBC shares of the defendants to Rashid Hussein Berhad was completed in June 1999 with the consequence that the latter came to own more than 90% of the entire shareholding of UMBC. The plaintiffs' minority shareholdings were accordingly compulsorily acquired by Rashid Hussein Berhad at a much reduced price of RM1.70 per share.

The acquisition rendered the injunctive relief sought by the plaintiffs ex post facto and will not be considered in this proceeding.

As the issues in the two originating summons are similar, it was agreed between the parties that the present proceeding be confined to issues on liability in originating summons D5-24-22-1999. The decision in originating summons D5-24-22-1999 should then be accepted as binding on originating summons D4-24-163-1999. Damages would only be assessed at a later stage should the defendants be found liable.

The defence

In essence, the defence is two pronged. They are set out clearly in the written submission of counsel for the defendants Mr. Robert Lazar.

Firstly, it was argued that the plaintiffs did not have a private cause of action against the defendants under the Securities Commission Act 1993.

The SCA, it was submitted, did not specifically state that an aggrieved person had a recourse to a civil action against the acquirer who refused to make an MGO; and so one must look for pointers or indicators within the SCA to discover whether such a right can be implied.

A strong pointer that would determine the existence of such a right, it was submitted, is the provision in the statute providing for the protection of right of a class of persons rather than for members of the public at large; where the statute does not provide for any remedy whatsoever for a breach of its provision, this would be indicative of a conferral of a private right of action; but where on the other hand there is in place in the statute itself a specific enforcement provision (such as the provision of a fine or a public censure as in the SCA), this would be indicative that no private cause of action was intended by the legislature.

Yet another pointer that would be indicative of providing a cause of action for breach of statutory duty, so it was submitted, is where a statute is enacted specifically to impose a statutory duty (such as the Factories Acts of the UK) against the offender - especially where the harm suffered by the claimant is physical in nature as opposed to mere economic loss.

Secondly, it was argued that even if the plaintiffs had such a private cause of action, the refusal of the MOF to approve the acquisition of additional shares lawfully excused the defendants from their obligation to carry out the MGO. The letter of Bank Negara of 9 April 1998, it was submitted, had made it clear that the defendants had been prohibited from acquiring any more of the shares of UMBC than the 60.35% that had been approved earlier by its letter of 18 January 1996.

Whether the defendants were under a statutory duty to make the MGO

In so far as the defence that the plaintiffs did not have a cause of action for breach of statutory duty against the defendants for failing to make the MGO that issue had been settled by the Supreme Court in *Petaling Tin Berhad v. Lee Kian Chan* [1994] 2 CLJ 346. In that case the Supreme Court had to decide *inter alia*, whether the acquirer of over 33% of the voting shares of a listed company under the corresponding rr. 34(1) and 34(7) of the Code of Take-Overs and Mergers 1981(sic 1987) was discharged from having to make the MGO given that the Securities Commission had already issued a public censure pursuant to the corresponding s. 179(7A) of the Companies Act 1965 then in force. In holding that the acquirer was still bound to make the MGO notwithstanding the public censure, this was what the Supreme Court said, (per Edgar Joseph Jr SCJ) at 362:

To return to the substantive issue, the submissions advanced by counsel for the appellant were twofold: first, if the imposition of a public censure has the legal effect contended for by the respondents, the whole purpose of the Code could be frustrated and circumvented by deliberate non-compliance. Secondly, it is illogical and unsatisfactory to draw the conclusion, as the Panel did, that a public censure can remove the very obligation the breach of which resulted in the imposition of the public censure in the first place. For emphasis, it was further submitted that the Panel's view was akin to saying that if a penalty were imposed by the Inland Revenue upon a taxpayer for not paying income tax, the obligation to pay the tax is dissolved upon paying the penalty.

With respect, we consider that the appellant's submissions on the substantive issue are not merely difficult but impossible to rebut, and so we uphold them.

Accordingly, we have no option but to rule that the imposition by the Panel of the public censure pursuant to the powers conferred upon it by s. 179(7A) of the Act, did not have the automatic effect of releasing the concert parties from the obligations and restrictions imposed on them by rr 34.1 and 34.7 of the Code; and that these obligations and restrictions continue in force unless and until the specific consent of the Panel is obtained by the concert parties under rr 34.1 and 34.7 of the Code or until the concert parties comply with the direction to make a mandatory general offer.

The ratio in *Petaling Tin*

Admittedly, the Supreme Court in handling down the decision did not go so far as to make a direct finding whether the acquirer has a statutory duty to make the MGO the breach of which the aggrieved minority shareholders may enforce as a right. It had merely assumed that such a duty and right existed.

But the existence of a statutory duty and the corresponding right under the SCA, it is clear, constituted the very core of the ratio of that case - for without this core finding, the Supreme Court could not have arrived at its decision that the public censure did not exempt the acquirer from having to make the MGO. It is inconceivable that the Supreme Court, the highest court in the land could have failed to apply its mind to the issue to arrive at the decision that it did. One can only therefore conclude that the existence of the acquirer's duty giving rise to an actionable wrong in the SCA was too obvious that it was taken for granted.

Following precedent, with respect, I must so find that it is no longer open to the defendants to raise as an issue that r. 34.1 of the 1987 Code did not impose upon the defendants the statutory duty of making the MGO which gave rise to the plaintiffs' right of action – for such a contention would fly in the face of the ratio in *Petaling Tin*.

I am now not alone in my finding. Zulkefli Makinudin J of the Shah Alam High Court had reached a similar conclusion in *Chin Yew Loy Holdings Sdn Bhd v. AU Metalvest (M) Sdn Bhd* [2002] 6 CLJ 141. In that case the defendant Metalvest had acquired control of 35% of Federal Auto Holding Bhd (FAHB) but had refused to make a MGO of the plaintiff's minority shareholding in that company contrary to the r. 34.1 of the same Code. The translated version of the judgment in the report read as follows:

> (2) The defendant was obligated to execute a mandatory general offer immediately after the acquisition. There was no discretion for the defendant whether or not to elect making an offer. Once the acquisition was complete, the mandatory obligation subsisted and based on this, the court should have granted relief of specific performance against the defendant to fulfill the mandatory offer (see p 125A-B).
>
> (3) The defendant's contention that he needed only make a mandatory general offer to FAHB and not to the plaintiff was untenable. The provision for a mandatory general offer was based on r 34.1(a) of the Malaysian Code and provisions in the Act that were superseded by the Malaysian Code on Take-overs and Mergers 1998 ('the Code'). Based on the Code, the defendant should have made an offer to 'offeree shareholders', ie including the plaintiff who was a minority shareholder of FAHB (see p 125B-G).

An Academic Exercise:

The decision in *Petaling Tin* notwithstanding, I have for the sake of completeness considered the issue of whether such a statutory duty was imposed on the acquirer to make the MGO under the law then subsisting. I am apt to come to the same finding that the defendants were under a statutory duty to make the MGO failing which the plaintiffs would have a cause of action under the SCA read with the 1987 Code.

My finding on this score will be purely academic. But it will not be in vain as it will serve as a platform for the defendants to persuade the appellate courts to revisit *Petaling Tin* and perhaps to see the SCA and the 1987 Code from a different perspective given that s. 33(9) of the SCA 1993, infra, had been repealed.

Defining The Right Of The Plaintiffs

To succeed in the instant case the plaintiffs must show that the conduct of the defendants in failing to make the mandatory general offer was in law an actionable wrong because it violated their recognized right under the Securities Commission Act 1993 read with the 1987 Code on Take-Overs and Mergers.

In short the plaintiffs must establish that there was a breach of statutory duty on the part of the defendants in failing to make the MGO which in turn gave them the right to a private cause of action.

That there was a breach of statutory duty on the part of the defendants in failing to make the MGO is not in dispute. What is in dispute here is whether the breach gave rise to a private cause of action.

Whether The Statute Imposed A Liability To Civil Action By The Plaintiffs

Neither the Act nor the Code provides in any definite statutory form any civil remedy against the errant acquirer who refused to undertake the MGO save to say under s. 33(9) of the Act (as it then stood) that:

> Subject to subsections (6), (7) and (8), a failure by any party concerned in a take-over or merger transaction to observe any of the general principles and rules in the Code shall not of itself render that party liable to criminal proceedings, but any such failure may, in any proceedings, whether civil or criminal, be relied upon by any party to the proceedings as tending to establish or to negate any liability which is in question in the proceedings.

That provision per se would not be sufficient to warrant a construction that the Act imposed a liability to civil act upon the plaintiffs. But it supplies a clear index of the intent of the legislature to expose any errant party who failed to observe the Code to both criminal and civil proceedings.

To succeed the plaintiffs must establish not only that the relevant provisions of the Securities Commission Act 1993 and the 1987 Code of Take-Overs and Mergers were enacted to protect a class of individuals to which they belonged but also that it was intended by the legislature that the breach thereof would confer upon them a private right of action.

To decide whether they had a cause of action it would be necessary to go further to examine the Act and the Code in order to determine their purpose, in particular, whether they were enacted to protect the class of persons to which the plaintiffs belong. This is a matter of construction of the Act read with the Code to determine the legislative intent (See *Wu Siew Ying v. Gunung Tunggal Quarry & Construction Sdn Bhd & Ors* [1999] 4 CLJ 339/361).

There is unfortunately a dearth of case law in our jurisdiction with respect to the tests to be applied in determining liability for breach of statutory. Recourse must therefore be made to English case law for its persuasive guidance.

Two opposing English decisions may be cited to illustrate the point.

In *Monk v. Warbey* [1935] 1 KB 75, the Court of Appeal in England held that a cause of action lay against the owner of a motor car who in breach of

his statutory duty under s. 35(1) of the Road Traffic Act 1930, had permitted his car to be used by a person who was not insured against third party risks, was liable to the third party who was injured by the negligent driving of the uninsured person. The court took the view that the Act in question 'was passed for the purpose of giving remedy to third persons who might suffer injury by the negligence of the impecunious driver of the car', and although the Act itself prescribed a penalty against the owner, 'there was nothing in the Act to show that a personal action is precluded by reason of the existence of a special remedy provided for a breach'.

On the other hand, in the earlier case of *Phillips v. Britannia Hygienic Laundry Co Ltd* [1923] 1 KB 539, the same court held that a breach of a statutory duty to keep a motor-car in a condition not to cause danger to any person on the car or on any highway was only a public duty and a person injured by the breach thereof has no remedy under the same statute, although he could well succeed at common law. The duty was held to be public because it was for the benefit of the public generally and the legislature could not have intended to create new duties toward individuals who are already sufficiently protected by the common law remedies of negligence.

The principle in the *Phillips* case was approved by the former Federal Court in *Tan Chye Choo & Ors v. Chong Kew Moi* [1966] 2 MLJ 4 which had to decide whether there was a cause of action on a breach of statutory duty for the defendant's failure to properly maintain a motor vehicle in a safe condition in breach of r. 94 of the Motor Vehicles (Construction and Use) Rules 1959 which read as follows:

> The condition of any motor vehicle used on a road and all its parts and accessories, shall at all times be such that no danger is caused or likely to be caused to any person on the vehicle or on the road.

The Federal Court confirmed the decision of the trial judge of the High Court that the duty imposed by r. 94 was a public duty and not a duty enforceable by an individual. It could not, therefore, provide a cause of action under the rules to the plaintiffs who in that case suffered injuries as a result of the failure of the braking and steering system of the vehicle.

The general rule for liability for violation of a statute was reasserted more recently, by the House of Lords in *Lonrho Ltd v. Shell Petroleum Co. Ltd and others (No. 2)* [1982] AC 173. In that case *Lonrho* had alleged that Shell and the others (its competitors in the oil trade) had committed a breach of statutory duty in failing to comply with Her Majesty's Order in Council prohibiting anyone from supplying crude oil or petroleum products to the then illegal regime of South Rhodesia while it had faithfully complied with the sanction. *Lonrho* sought compensation from the respondents alleging that it

had suffered loss from the conduct of the respondents which had the effect of prolonging the period of the sanction thereby preventing its pipeline from operating sooner to supply oil to Southern Rhodesia.

This was what Lord Diplock (Edmund-Davis, Keith and Scarman LJJ concurring) restated the general rule in the following passage of his speech (at p. 6 Lexis-Nexis):

> The sanctions order thus creates a statutory prohibition on the doing of certain classes of acts and provides the means of enforcing the prohibition by prosecution for a criminal offence which is subject to heavy penalties including imprisonment. So one starts with the presumption laid down originally by Lord Tenterden CJ in Doe d Bishop of *Rochester v. Bridges* [1831] 1B & Ad 847 at 859, [1824-34] All ER Rep 167 at 170, where he spoke of the 'general rule' that 'where an Act creates an obligation, and enforces the performance in a specified manner… that performance cannot be enforced in any other manner', a statement that has frequently been cited with approval ever since, including on several occasions in speeches in this House. Where the only manner of enforcing performance for which the Act provides is prosecution for the criminal offence of failure to perform the statutory obligation or for contravening the statutory prohibition which the Act creates, there are two classes of exception to this general rule.
>
> The first is where on the true construction of the Act it is apparent that the obligation or prohibition was imposed for the benefit or protection of a particular class of individuals, as in the case of the Factories Acts and similar legislation. As Lord Kinnear put it in *Black v. Fife Coal Co Ltd* [1912] AC 149 at 165, in the case of such a statute:
>
> > There is no reasonable ground for maintaining that a proceeding by way of penalty is the only remedy allowed by the statute … We are to consider the scope and purpose of the statute and in particular for whose benefit it is intended. Now the object of the present statute is plain. It was intended to compel mine owners to make due provision for the safety of the men working in their mines, and the persons for whose benefit all these rules are to be enforced are the persons exposed to danger. But when a duty of this kind is imposed for the benefit of particular persons there arises at common law a correlative right in those persons who may be injured by its contravention.
>
> The second exception is where the statute creates a public right (ie, a right to be enjoyed by all those of Her Majesty's subjects who wish to avail themselves of it) and a particular member of the public suffers what Brett J in *Benjamin v. Storr* [1874] LR 9 CP 400 at 407 described as 'particular, direct and substantial' damage 'other and different from that which was common to all the rest of the public'.

Having set out the rule that has to be applied one must now examine the SCA and the Code to determine whether there is a private cause of action.

Objective Of The Securities Commission Act 1993 And The 1987 Code On Take-Overs And Mergers

The objective of the Securities Commission Act 1983 is basically to provide a regulatory framework for the securities and futures industries. Its functions are set out in s. 15(1) of the Act as follows:

15.(1) The Commission shall have the following functions:

(a) to advise the Minister on all matters relating to securities and futures contract industries;

(b) to regulate the issue of securities;

(c) to regulate the designation of futures contracts;

(d) to regulate the take-overs and mergers of companies;

(e) to regulate all matters relating to unit trust schemes;

(f) to be responsible for supervising and monitoring the activities of any exchange, clearing house and central depository;

(g) to take all reasonable measures to safeguard the interest of persons dealing in securities or trading in futures contracts;

(h) to promote and encourage proper conduct amongst members of the exchanges and all registered persons;

(i) to suppress illegal, dishonourable and improper practices in dealings in securities and trading in futures contracts and the provision of investment advice or other services relating to securities or futures contracts;

(j) to consider and suggest reforms of the law relating to securities or futures contracts including changes to the constitution, rules and regulations of any exchange and its clearing house;

(k) to encourage the development of securities and futures markets in Malaysia; and

(l) to perform any functions conferred by or under any other Act.

Of relevance to the present summons in the above subsections are (d) and (i) which specifically provide for the regulation of take-overs and mergers, and the suppression of illegal, dishonourable and improper practice in dealings in securities coupled with the power granted to the Commission under s. 33(1) of the Act.

Of the regulatory framework and the underlying principles of the 1987 Code on Take-Overs and Mergers made pursuant to s. 33(3), Loh Siew Cheang in the 1996 edition of his book Corporate Powers provides at p. 375, a well researched overview of the Code which I would accept as accurately describing the function and mission of the Securities Commission:

> The Code on Take-Overs and Mergers 1987 contained 14 general principles and 40 Rules. The general principles were broadly phrased, reflecting what were considered to be good standards of commercial behavior. The rules on the other hand, governed the mechanics of the procedure to be followed in the event of a take-over. In very many instances, the rules under the repealed Code were actually built upon the concept of fairness as expressed by the general principles and they illustrated the way in which the general principles were to be applied or upheld.

In the 2002 edition of his work the same author gives a more definitive description of the function of the Commission with respect to its supervisory and regulatory powers under the Act:

> In administering the Code and in exercising its powers under the SCA in relation to take-overs and mergers, the basic requirement is that the Commission must take into account that the acquisition of control of companies takes place in an 'efficient, competitive and informed market': s. 33A(5) of the SCA. In particular, regard must be given to the need to ensure: transparency of the identity of the acquirer and offeror; reasonable time and sufficient time and sufficient information are given to the target company and its shareholders to consider the merits of an offer; equal opportunities are given to shareholder of the target company to participate in the benefits of the take-over or merger; fair and equal treatment of the shareholders of the target company; observance of good faith; that minority shareholders are not subjected to unfair conduct.

Having examined the Securities Commission Act 1983 as a whole and in particular the function of the Commission with respect to the administration, supervision and regulation of take-overs and mergers under s. 15(1)(d) of the Act, and the general principles and rules prescribing the standard of behaviour expected of a person undertaking a take-over or merger of a company under the 1987 Code there could be little doubt in my mind that the Act was enacted for the ultimate protection of a class of persons, namely of investors in general and specifically under Part IV thereof, the protection of a sub-class, namely of the existing shareholders of the company affected by a take-over or merger by the instrument of the 1987 Take-over and Merger Code which the acquirer is obliged to comply.

It is to be noted that s. 33(9) of the SCA had specifically exempted the errant acquirer from criminal prosecution under the Act; and if one were to take the cue from the judgment of Lord Diplock in the *Lonrho* case, *supra*, it would appear all the more likely that the legislature had not intended to preclude the right of shareholders aggrieved by the failure to make the MGO to seek legal redress under the Act. On the contrary, after having been convinced that the Act was enacted for the benefit of investors as a class, and the Code for the benefit of a sub-class (of shareholders within the class of investors), I would venture to say that s. 33(9) had the effect of making it all the more clear that they had a right of action against the acquirer for breach of statutory duty under the Code as it then stood. The position may now be different with the deliberate amendment in 1999 to the SCA by providing a new provision in s. 33B(4) to make any non-compliance of the Code a criminal offence, which by contrast would now provide a strong indicator that the legislature has now had a change of mind to disallow a private cause of action.

I do not consider it necessary to embark on any further search for any other pointers as suggested by counsel for the defendants in order to discover whether the legislature had intended the breach actionable. One need not look any further - that intent is clear from s. 15 and s. 33(9) of the Act and the Code.

The underlying objective of the MGO as Loh Siew Cheang said at 841 of the 2002 edition of his book, *supra*, "is to achieve equity between the remaining shareholders of the offeree company and those shareholders from whom the acquirer had purchased the shares. By this route, it gives the remaining shareholders an opportunity either to accept the rewards of the mandatory offer and thus make an exit from the company or to remain with the company with the new controller."

For all the risks that the minority shareholders had to bear by the intrusion of the acquirer upon the *status quo* of their shareholdings, there must surely accrue to them some corresponding right to make a choice whether to stay or to leave; surely the failure of the acquirer to make a MGO could not be construed as anything less than an actionable wrong under the Act which infringed the right of the remaining shareholders to make that choice; and having specifically provide under s. 33(9) that "any such failure may, in any proceedings, whether civil or criminal, be relied upon by any party in the proceedings as tending to establish or negate any liability which is in question" the legislature could not have intended that the aggrieved party should take his claim somewhere else – for where else can he go to institute his claim but under the very statute that gave him the right.

The submission that the provision under s. 33(10) conferring the power on the Securities Commission to "invoke such sanction as private reprimand, public censure or temporary or permanent deprivation of enjoyment of the facilities of a stock exchange as it deems fit" should be read to mean that the legislature had intended to exclude the right of persons aggrieved from commencing civil liability for failing to make the MGO, is untenable. In my view, the public censure provision serves a different purpose - to convey to the disapproval of the SC as a regulatory body of the errant acquirer on the one hand, and on the other, to put its integrity on notice to the investing community at large. It also serves the purpose of notifying persons aggrieved providing them with a starting point to consider the option whether to commence civil action to enforce their right. Section 33(10) in fact complements s. 33(9) by opening up that option and any other construction of that sub-section would be inconsistent with the enabling provision of s. 33(9).

That the effect of a public censure of the SC was clearly not a substitution of the civil liability that the errant acquirer may have to face need no further elaboration. The issue had been settled by the Supreme Court in *Petaling Tin Berhad v. Lee Kian Chan* [1994] 2 CLJ 346, per Edgar Joseph Jr SCJ, *supra*.

The Thrust Of Defence

The thrust of the defence however, rests on the argument that they were not bound to comply with the SC's directive to implement the MGO as the MOF had, acting under the Banking and Financial Institutions Act 1989 (BAFIA) specifically prohibited them from acquiring any more of the UMBC shares including the plaintiffs' 5.01% shareholdings the fact of which was alluded to earlier in this judgment.

Unlike in *Petaling Tin supra*, so it was argued, which involved a straight forward application of the SCA, UMBC was a financial institution and any dealing of substance in its shares was regulated under BAFIA which the defendants were bound to follow.

The Argument That The Defendants Were Protected Under BAFIA

The defendants' argument would have to be considered by applying public law principle with respect to the validity of the directive purportedly made under BAFIA.

To fully appreciate their argument it is first necessary to examine the nature of the approval (or from the defendants' standpoint, the non-approval) of the MOF with respect to the acquisition.

The four letters from Bank Negara conveying the decisions with respect to the defendants' application to acquire the UMBC shares must now be examined in turn.

The First letter

The first letter addressed to a director of UMBC Holdings was dated 10 November 1995 conveyed in no uncertain term the MOF's unconditional approval of the defendants' acquisition. It read as follows:

BANK NEGARA MALAYSIA

10 November, 1995

Encik Azimuddin Ab. Ghani

Pengarah
UMBC Holdings Sdn. Bhd.
Tingkat 2, Bangunan UMBC
Jalan Sultan Sulaiman
50000 Kuala Lumpur.

Tuan,

Cadangan Pelupusan Kepentingan Di Dalam Ekuiti United Malayan Banking Corporation Berhad (UMBC)

Kami merujuk surat tuan bertarikh 9 November 1995 dan memaklumkan bahawa menurut seksyen 45 Akta Bank dan Institusi-institusi Kewangan 1989, Yang Amat Berhormat Menteri Kewangan telah meluluskan cadangan UMBC Holdings Sdn. Bhd. untuk melupuskan sebanyak 201,168,890 syer-syer UMBC bernilai tara RM1.00 tiap-tiap satu pada harga RM1,300,000,000 atau kira-kira RM6.46 sesyer, kepada Kumpulan Sime Darby Berhad.

Sekian.

Yang benar,
(Dato'Abdul Murad Khalid)
Penasihat

The Second Letter

The 2nd letter was dated 18 January 1996 and appeared to have been a response to the 1st defendant's application to make the MGO through a related company Consolidated Plantations Bhd. The letter read as follows:

BANK NEGARA MALAYSIA

Bilangan Kami: 2201/135/3/2/JHB/AH

18 Januari, 1996

Tuan Syed Fahkri Barakbah
Pengarah Kewangan Kumpulan
Sime Darby Berhad
Tingkat 21, Wisma Sime Darby
Jalan Raja Laut
50350 Kuala Lumpur.

Tuan,

Cadangan Berkaitan Pelupusan dan Pembelian Saham United Malayan Banking Corporation Berhad (UMBC)

Kami merujuk surat-surat tuan bertarikh 2 dan 11 Januari 1996 mengenai perkara di atas.

2. Adalah dimaklumkan bahawa Y.A.B. Menteri Kewangan telah meluluskan cadangan Kumpulan Sime Darby Berhad (SDB) untuk menggantikan SD Holdings Berhad (SDHB) dengan Consolidated Plantations Berhad (CPB) sebagai syarikat induk Sime Communications Sdn. Bhd. (SCSB), melalui perolehan keseluruhan ekuiti SCSB daripada SDHB oleh CPB. Dengan kelulusan ini, Y.A.B. Menteri Kewangan memberi pengecualian daripada seksyen 46 Akta Bank dan Institusi-institusi Kewangan 1989 (ABIK) di bawah seksyen 118 ABIK kepada CPB bagi membolehkan CPB memegang kepentingan anggapan melebihi had yang ditetapkan oleh seksyen 46 ABIK. Ini bererti pengecualian sama yang telah diberi kepada SDHB melalui surat kami bertarikh 10 November 1995 adalah ditarik balik.

3. Walau bagaimanapun, cadangan Kumpulan SDB untuk memperolehi syer-syer tambahan UMBC melalui tawaran am mandatori terhadap baki syer UMBC yang tidak dimiliki oleh Kumpulan SDB, seperti yang dikehendaki oleh Peraturan 34, Kod Pengambilalihan dan Percantuman, adalah tidak diluluskan.

Sekian.

Yang benar,
t.t.
(Dr. Awang Adek Hussin)
Pengurus
Jabatan Pengawalan Bank

s.k. Y. Bhg. Dato' Dr. Mohd Munir bin Abdul Majid
Pengerusi
Suruhanjaya Sekuriti
3, Sri-Semantan Satu
Bukit Damansara
50490 Kuala Lumpur.

Paragraph 3 of the letter (underlined) purports to withdraw the approval of the MOF given under its previous letter of 10 November 1995. It states specifically that the defendant's proposal to acquire the additional shares in UMBC by a MGO under r. 34 of the Code was not approved.

To recapitulate, it was this letter of non approval of the MOF that prompted the defendants to seek the approval of the SC to dispense with the MGO which the SC rejected but indicated that it was prepared to reduce the scope of the defendants' obligation to restrict the MGO to the small independent investors in UMBC, which formed about 5.01% of the total issued and fully paid up shares of UMBC. Consequently, the defendants made the application to restrict the MGO only to the minority 5.01% shareholdings as suggested and the SC accordingly acceded to that application. The defendants then proceeded with the acquisition of the UMBC shares from the UMBC group on 22 April 1996.

The 3rd Letter

By a letter dated 17 October 1997 the MOF approved the defendants' application to make the MGO of the remaining shares of UMBC that it did not already owned under the Prolayar scheme. The letter read as follows:

BANK NEGARA MALAYSIA

Bilangan Kami: 2201/135/3/2/RS/MF

17 Oktober, 1997

Encik Azman Yahya
Pengarah Eksekutif
Amanah Merchant Bank Berhad
Tingkat 19, Bangunan Komplek Kewangan
82, Jalan Raja Chulan
50200 Kuala Lumpur.

Tuan,

Cadangan Pemerolehan Keseluruhan Ekuiti Di Dalam Sime Bank Berhad (SBB)

Kami merujuk surat tuan bertarikh 3 Oktober 1997.

2. Adalah dimaklumkan bahawa Yang Amat Berhormat Menteri Kewangan telah memberi kelulusan terhadap cadangan Sime Darby Financial Services Sdn. Bhd. (SDFS) untuk memperolehi kesemua ekuiti SBB yang masih tidak dipegang olehnya melalui tawaran am mandatori tanpa syarat di bawah Peraturan 34, Kod Pengambilalihan dan Percantuman 1987 dan diikuti dengan SDFS melupuskan keseluruhan syer SBB yang dimilikinya kepada Prolayar Holdings Bhd. (PHB). Sehubungan itu, menurut peruntukan-peruntukan di dalam Akta Bank dan Institusi-institusi Kewangan 1989 (ABIK) kelulusan-kelulusan berikut adalah diberikan:

(i) Menurut Seksyen 45(1)(a) ABIK untuk membenarkan SDFS memperolehi kepentingan ekuiti secara langsung melalui tawaran am mandatori di dalam SBB (100%) dan kepentingan anggapan di dalam Sime Finance Berhad (SFB) (100%) dan Sime Merchant Bankers Berhad (SMB) (51%);

(ii) Menurut Seksyen 45(1)(a) ABIK untuk membenarkan Consolidated Plantations Berhad (CPB) dan Sime Darby Berhad (SDB) memperolehi kepentingan anggapan di dalam SBB (100%), SFB (100%) dan SMB (51%);

(iii) Menurut Seksyen 45(1)(a) ABIK untuk membenarkan Permodalan Nasional Berhad (PNB) dan syarikat/institusi/orang perseorangan yang diwakilinya yang memegang 15% atau lebih ekuiti SDB, memperolehi kepentingan anggapan di dalam SBB (100%), SFB (100%) dan SMB (51%);

(iv) Menurut Seksyen 45(1)(b) ABIK untuk membenarkan KUB Malaysia Berhad (KUB) melupuskan keseluruhan kepentingan ekuitinya secara langsung di dalam SBB (30.01%) dan kepentingan anggapan di dalam SFB (100%) dan SMB (51%) kepada SDFS;

(v) Menurut Seksyen 46 ABIK bagi membolehkan PHB memiliki kepentingan secara langsung di dalam syer SBB dan kepentingan anggapan di dalam SFB dan SMB melebihi had yang ditetapkan di bawah Seksyen tersebut;

(vi) Menurut Seksyen 45(1)(a) ABIK untuk membenarkan PHB memperolehi kepentingan ekuiti secara langsung di dalam SBB (100%) dan kepentingan anggapan di dalam SFB (100%), SMB (51%), daripada SDFS;

(vii) Menurut Seksyen 45(1)(b) ABIK untuk membenarkan SDFS melupuskan keseluruhan kepentingan ekuitinya secara langsung di dalam SBB (>60.35%) dan kepentingan anggapan di dalam SFB (100%) dan SMB (51%) kepada PHB; dan

(viii) Menurut Seksyen 49(7) ABIK untuk membenarkan SDFS dan PHB membuat perjanjian atau perkiraan antara satu sama lain yang akan mengakibatkan perubahan dalam kawalan ke atas SBB daripada SDFS kepada PHB.

Sekian, terima kasih.

Yang benar,
t.t.
(Mohd Razif Abdul Kadir)
Pengarah
Jabatan Pengawalan Bank

The 4th Letter

To recapitulate, the Prolayar scheme was never implemented although both the SC and Bank Negara had approved it. The defendants' inactivity prompted Bank Negara to write the 4th letter to the defendants.

The 4th letter from Bank Negara was dated 9 April 1998 and was signed by a Dato' Abdul Murad Khalid a Penolong Gabenor of the Bank.

It purported to disapprove the proposal by the defendants to make the MGO of the remainder of the shares of Sime Bank (including the 5.01% held by the plaintiffs) through Prolayar.

It also purported to withdraw the consent granted by the MOF vide its letter dated 17 October 1997 for the acquisition and to reassert that its letter of 18 January 1996 disapproving the defendants from making the MGO was still in force.

The letter read as follows:

BANK NEGARA MALAYSIA

Bilangan Kami: 2201/135/3/2/RS

9 April, 1998
Encik Azman Yahya
Pengarah Eksekutif
Amanah Merchant Bank Berhad
Tingkat 19, Bangunan Komplek Kewangan
82, Jalan Raja Chulan
50200 Kuala Lumpur.

Tuan,

Sime Darby Berhad – Cadangan Pelupusan 60.35% Kepentingan Ekuiti Dalam Sime Bank Berhad

Kami merujuk surat-surat tuan bertarikh 17 dan 23 Mac serta 3 April 1998.

2. Kami mengambil maklum bahawa cadangan penyusunan semula pemegangan syer Sime Bank Berhad (Sime Bank) oleh Kumpulan Sime Darby Berhad, yang antara lain melibatkan Sime Darby Financial Services Sdn. Bhd. mengadakan tawaran am mandatori ke atas baki syer Sime Bank yang tidak dimilikinya dan Sime Bank diletakkan di bawah Prolayar Holdings Berhad, telah tidak dapat diteruskan.

3. Sehubungan dengan itu, Bank Negara Malaysia (BNM) telah memutuskan:

(i) Surat kelulusan BNM bertarikh 17 Oktober 1997 mengenai cadangan penyusunan semula tersebut adalah ditarik balik; dan

(ii) Surat BNM bertarikh 18 Januari 1996 yang tidak membenarkan Kumpulan Sime Darby Berhad mengadakan tawaran am mandatori ke atas baki syer Sime Bank masih berkuatkuasa.

Sekian, terima kasih.

Yang benar,
t.t.
Dato' Abdul Murad Khalid
(Penolong Gabenor)

Unlike the previous three letters from Bank Negara which merely conveyed the directive of the MOF with respect to the acquisition, it would appear that by this letter Bank Negara through its Assistant Governor, Dato' Abdul Murad Khalid had acted on its own to withdraw the previous approval of the MOF of 17 October 1997 and to reassert the MOF's earlier disapproval of the MGO.

It is to be noted that by 9 April 1998 when the letter was written, the defendants had completed the acquisition of the 60.35% shareholding in UMBC from the UMBC group, having obtained the approval of the MOF to the acquisition and to undertake the MGO of the 5.01% of the minority shareholdings.

The Doctrine Of Substantive *ultra vires*

The last letter purporting to withdraw consent not being a decision of the MOF had violated a cardinal principle of public law that the exercise of a statutory power may only be exercised in the way the legislature had intended. It is clear the power to approve any application under s. 45 or 46 or to grant any exemption or to revoke any approval under s. 118 of BAFIA vested exclusively with the MOF.

The function of Bank Negara under BAFIA it is to be noted was purely to transmit the application of the defendants to the MOF with its recommendation

and not to take upon itself the task of making the decision. This is clear from s. 45(2) with respect to obtaining the prior approval to enter into an agreement or arrangement which read as follows:

> An application for approval under subsection (1) shall be made by the person intending to acquire or dispose any interest in shares referred to therein and shall be sent to the Bank, whereupon the Bank shall submit such application, together with its recommendation thereon to the Minister.

The delineation of functions between Bank Negara and the MOF is clearest when one looks at s. 49(5) of the Act with respect to entering into the agreement or arrangement under s. 49(1), which read as follows:

> The Bank shall, on an application having been duly made ... consider the application, and make a recommendation to the Minister whether the application shall be approved or refused and as to the modification, variations or conditions, if any subject to which it may be approved.

The same applies with respect to the granting of exemption by the MOF from any of the provisions of BAFIA, wherein s. 118(1) of the Act provides that the Minister may only act "on the recommendation of the Bank".

Where a statutory body acts outside the limit of its jurisdiction such as in the instant case, it is acting *ultra vire*s and regardless of motive, its act was unlawful. The learned author of Administrative Law of Malaysia and Singapore M.P. Jain in the 2nd edition of his book at 346 prefers the term 'substantive *ultra vires*' to describe a situation where it was not within the jurisdiction of an administrative body to make the decision as opposed to a situation where it had the jurisdiction to do so but in doing so, committed a procedural impropriety which the learned author described as 'procedural *ultra vires*'.

The principle of substantive *ultra vires* is well entrenched in our jurisdiction. In his book M.P. Jain cited the case of *Francis v. Municipal Councillors of Kuala Lumpur* [1962] MLJ 407 to illustrate the principle of substantive *ultra vires*; and this was what he said at 346:

> This doctrine of substantive *ultra vires* may be illustrated by reference to some cases. Under Section 16(5) of the Municipal Ordinance 1948, the power to dismiss an employee of the municipal corporation vested in the President thereof. Therefore, removal of an employee by the Council, and not by the President, was held to amount to wrongful dismissal.

The principle was restated and applied in the Federal Court case of *Fadzil bin Mohamed Noor v. Universiti Teknologi Malaysia* [1981] 2 MLJ 196. In that case an assistant lecturer was dismissed by the University Council

contrary to s. 7(2) of the Universities and University Colleges Act 1971 which prescribed that such a power was exercisable only by the Disciplinary Committee of the University. In declaring the dismissal void, this was what Raja Azlan CJ (Malaya) as he then was said at p. 198 of the report:

> The University was incorporated under Act 30 of 1971. It is a corporate body, and as such it can only do such acts as are authorised directly or indirectly by the statute creating it: see *Attorney-General v. Leeds Corporation*. In *Public Textiles Bhd. v. Lembaga Letrik Negara* this court said in relation to a corporation that whatever is not permitted expressly or by necessary implication by the incorporating statute is prohibited not by the express or implied prohibition of the legislature but by the principle of *ultra vires*. Therefore the university authority can only act in pursuance of the powers given to it by law. It follows that it has to follow proper procedure as prescribed by law before condemning an erring member of the staff. If it goes outside its limit of operation, or is not warranted by it, then any decision made by it is *ultra vires*.

In the course of his submission the assisting counsel for the defendants Mr Rajasingam sought to justify the validity of the letter under the principle in *Carltona Ltd v. Commissioners of Works* [1943] 2 All ER 560. The principle was alluded to and applied by Abdul Malik Ishak J in *Ganad Media Sdn Bhd v. Dato' Bandar Kuala Lumpur (No 1)* [2002] 1 CLJ 700 HC. Convenience and necessity, it was submitted, often demand that a public authority works through committees, executive officers and other such like agencies such that a decision of Bank Negara in this case must be regarded as a decision of the MOF himself. In the *Carltona*, the owner of a factory challenged a war time requisitioning order made on behalf of the Commissioners of Works. The Commissioners had power to requisition land 'if it appears to that authority to be necessary or expedient to do so'. But the Commissioners themselves never met or transacted business as a body; their powers were exercised entirely by their officials. The requisitioning order was signed by an assistant secretary, who was solely in charge of the case. The Commissioners themselves never considered the requisition. Nevertheless it was held by the Court of Appeal that this procedure was perfectly valid. Per Lord Greene M.R. at 563 of the report:

> It cannot be supposed that this regulation meant that, in each case, the minister in person should direct his mind to the matter. The duties imposed upon ministers and the powers given to ministers are normally exercised under the authority of the ministers by responsible officials of the department. Public business could not be carried on if that were not the case. Constitutionally, the decision of such an official is, of course, the decision of the minister. The minister is responsible. It is he who must answer before Parliament for anything that his officials have done under his authority .... .

With respect I do not think the *Carltona* principle can be applied to the instant case. The *Carltona* is concerned purely with the delegation of duty by necessity and convenience as opposed to a delegation of function and authority. Where therefore, an agency has been assigned a specific and independent role to play in the decision making process other than making the decision itself, I do not think it is competent for that agency to step into the shoes of its master to make a decision in its own right and capacity - as Bank Negara had done in this case. The role of Bank Negara was specifically to make a recommendation to the MOF. The decision itself must be made by the MOF and not by Bank Negara. The position would be otherwise if the decision was made under the authority of the minister as in the *Carltona*. Clearly that was not the case here, for by the words **'Bank Negara Malaysia (BNM) telah memutuskan'** appearing at para. 3 of that letter, it is clear that Bank Negara was acting in its own capacity (as opposed to acting on behalf of the MOF) to withdraw the approval granted earlier by the MOF on 17 October 1997. It was in this instance purporting to exercise a power which it clearly did not have and was therefore acting *ultra vires*.

The Consequence Of Having Acted *Ultra Vires*

Having offended the principle of substantive *ultra vires* it is clear that the decision of Bank Negara purporting to withdraw the consent of the MOF was an exercise in futility. It follows that the letter cannot be relied upon by the defendants as a fact that the MOF had prohibited them from undertaking the MGO and consequently an excuse not to make the MGO as mandated by the SC.

Failure To Consider The Legitimate Expectation Of The Plaintiffs

But even assuming that the letter was for all intents and purposes to be construed as a letter of the MOF to revoke or cancel the previous approval which the MOF had made, that order was still an invalid exercise of the minister's power – for the following reason:

Having earlier by its letter of 17 October 1997, approved the defendants' application to undertake the MGO of the balance of the shares still not owned by the defendants including the plaintiffs' 5.01% shareholding under the Prolayar scheme, the minister had conferred upon the plaintiffs a legitimate expectation that the defendants would be obliged under the Code to undertake the MGO of their shareholdings if and when the defendants acquired the shares of the UMBC group. By reversing his approval some 6 months later (and some 14 months after the defendants had completed their acquisition) without affording the plaintiffs a hearing, the MOF's decision (assuming that he had made it) was clearly amenable to judicial review for Wednesbury unreasonableness.

The law with respect to the fettering of the discretion of a statutory authority where the exercise of that power touches on the legitimate expectation of persons who would be affected in consequence thereof, is now well entrenched in our jurisdiction with the decision of the Federal Court in *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan* [1999] 3 CLJ 65.

In that case a crucial issue (among others) that the Federal Court had to decide was whether the Majlis Perbandaran Pulau Pinang (the Council) had committed a procedural *ultra vires* in imposing an additional condition on a planning permission which it had granted earlier to the appellant co-operative society Syarikat Bekerjasama-sama (the Society) requiring it to build 30% of flats which had to be sold only to the members of the society at the low price of RM25,000 per unit. The power was exercised pursuant to s. 24(5) of the Town and Country Planning Act 1976 which confers upon local authorities a generous discretion to attach conditions upon the grant of planning permission as "they think fit". The earlier planning permission had not made any reference to any such condition, although by a separate letter accompanying the planning permission, the Council had expressed the hope that the society's developer comply with the Council's Guidelines for Low Cost Flats that "30% of the low cost houses have to be built and sold at a cost not exceeding RM25,000/- per unit in accordance with Government policy."

Pursuant to the grant of the earlier planning permission, the Society had in fact proceeded to sell the flats at the price of RM38,000 for the 2-bedroom type and RM62,000 for the 3-bedroom type. The pricing at which the two types of flats were sold by the society was later ratified by the Council at a subsequent Council meeting.

It was argued by the Society that its legitimate expectation had been violated when the Council imposed the later condition when no such condition was attached to the original planning permission issued earlier to the Society. It was also argued that after having acted subsequently to ratify the pricing at which the units were to be sold and in consequence of which the Society had proceeded to sell many of them, the Council would now be estopped from imposing the later condition on the Society. The arguments found favour with the Court of Appeal hearing the appeal at first instance. It went further to rule that the legitimate expectation brought about by the Council upon the Society had in fact granted it a substantive right and therefore the Council was estopped from imposing the new condition.

The Court of Appeal decision was confirmed by the Federal Court.

The Federal Court recognized the fact that under s. 8(4) of the Act the Council had the power when granting an application for planning permission, or an extension or further extension of the planning permission, to impose a planning condition to give effect to affordable housing as proclaimed in its guidelines and that in the ordinary course the rules of natural justice do not require it to hold a hearing before imposing such condition. But in the exceptional circumstances of that case, it ruled that the Court of Appeal was right in its view that natural justice required the Council to give advance notice of its intention to impose the new condition to afford the Society the opportunity to make representation for it may well turn out that the Council may decide not to impose the new condition after hearing the Society.

The relevant passage in the decision of the Federal Court touching on legitimate expectation as an element of relevant consideration that the decision maker was duty bound to consider appears at p. 59 E of the report. The court (per Edgar Joseph Jr FJ) relied on the following passages at para. 13-034 of the 5th edn, of de Smith, *Judicial Review of Administrative Action* (5th edition):

> Given the duty of a public body not to fetter its discretion under what circumstances will a legitimate expectation be protected in the face of a change in policy? Clearly, the change of policy must be 'a lawful exercise of discretion' (per Lord Scarman in *Re Findlay* [1985] AC 318, 338). The body's discretion to alter its policy must therefore be exercised after taking into account relevant considerations, and ignoring the irrelevant. The body must also pursue authorized and not extraneous purposes. These considerations and purposes can include matters such as the need to maintain national security and matters of public policy. Nor should the discretion be exercised unreasonably - for example, simply in order to confound the recipient of the expectation, or in bad faith. The conduct of the recipient of the representation should not be relevant to a decision to revoke the representation.

And this was what the court said when approving the judgment of the Court of Appeal with respect to the need to give persons whose legitimate expectation would be affected by an executive act a fair opportunity to make representation:

> Then, touching upon how the legitimate expectation of the Society had a procedural impact - this being the second category of the formulation of the distinct senses in which the concept of legitimate expectation was employed by Simon-Brown LJ in *Ex p Baker (ibid)* - the Court of Appeal said this (at p 919 para 1, AR 'C'):
>
> > In the second sense we think that the Respondent should have given advance notice of its intention to impose the second condition because the rules of natural justice demanded it. It is very possible that if a fair opportunity had been given to make representations the second condition would not have been imposed on 20 July 1993.

The plaintiffs' legitimate expectation in the instant case was sufficiently well entrenched as to amount to almost a right and was substantial enough to require a right to be heard before a decision was made on the MGO – for the re-imposition of a restriction on the defendants to undertake the MGO would have the effect of releasing the defendants from having to perform their statutory obligation under the law and consequently depriving the plaintiffs permanently of their right to the MGO. The fact that the right had been vested in the plaintiffs since 22 April 1996 (the day the defendants completed the acquisition), coupled with the fact that the decision of the MOF with respect to the approval of the MGO itself had undergone a reversal of approval and disapproval made it all the more necessary that the plaintiffs be afforded the opportunity to be heard before a decision was made to revoke the approval.

The failure to consider the plaintiffs' legitimate expectation in this instance constitutes a failure to consider a relevant consideration thereby subjecting the decision to judicial review on ground of 'procedural impropriety' or what is now referred to as 'Wednesbury unreasonableness'.

As *de Smith, supra*, wrote at para. 13-035:

> Although free to alter its policy, the authority is by no means free to ignore the existence of a legitimate expectation. Now that legitimate expectation has been accepted in Law as an interest worthy of protection, its existence becomes a relevant consideration which must be taken into consideration in the exercise of discretion. It is placed on the scale and must be properly weighed ... .

The law with respect to procedural impropriety has been well developed. The leading case on the subject is *R Rama Chandran v. The Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147, wherein the Federal Court at 187, adopted Lord Diplock's oft-cited statement of the law in *Civil Service Unions & Ors v. Minister for Civil Service* [1985] AC 374 at 410-411 with respect to administrative decisions which are susceptible to judicial review:

> By 'illegality' as a ground for Judicial Review I mean that the decision maker must understand directly the law that regulates his decision making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of a dispute, by those persons, the judges, by whom the judicial power of the state is exerciseable.
>
> By 'irrationality' I mean what can by now be succinctly referred to as 'Wednesbury unreasonableness' (see *Associated Provincial Picture Houses Ltd v. Wednesbury Corp* [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question

> that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the courts' exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in *Edwards v. Bairstow* [1956] AC 14, of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though undefinable mistake of law by the decision maker. 'Irrationality' by now can stand on its own feet as an accepted ground on which a decision may be attacked by Judicial Review.
>
> I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failing to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to Judicial Review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice.

A cursory reading of s. 118(b) and (c) of BAFIA tends to convey the meaning that the MOF had the power to revoke, or rescind the approval he made on the MGO without affording the plaintiffs an opportunity to be heard. But it is clear the subsections only apply to persons on whom the exemption is granted under the Act, such as the defendants the acquirer of the shares and not to minority shareholders such as the plaintiffs whose shares formed the subject of the MGO and who had not made any application to the MOF.

There is yet another but lesser aspect of the decision which is susceptible to judicial review. To recapitulate, on 10 November 1995 when the MOF granted the approval to the defendants to acquire the UMBC shares from the UMBC group, clearly that approval was unconditional. One must suppose that in granting the approval the MOF knew the law, that is to say, that SCA and the Code would require the defendants to undertake the MGO of the remaining shares of UMBC. An approval by the MOF in this instance must (as counsel for the plaintiffs in O.S. D4-24-163-1999, Mr. Ranjit Singh rightly submitted), be taken to include the approval for the defendants to undertake the MGO. Had the MOF intended to disapprove it or to impose any condition, nothing would have been clearer than to say it outright in the same letter of approval. The subsequent letter of 18 January 1996 was therefore in substance, a revocation of that approval. That revocation was lifted on 17 Ocrober 1997 when the MOF approved the Prolayar scheme - only to be revoked again by the 4th letter on 9 April 1998, at a time when the defendants had completed the acquisition and when their obligation to undertake the MGO had already been triggered under the SCA. To that extent it may be correct to say that the MOF was by then *functus officio* when he made the last decision as there

must be some finality to any decision that the MOF could make. He was however, not *functus officio* at the time when he disallowed the MGO by the second letter of 18 January 1996 as counsel had submitted, as at that point of time the acquisition was still pending and s. 118(3) of BAFIA empowered the MOF to revoke any exemption from any of the provisions of the Act that he may have given pursuant to s. 118(1).

It may be argued that the MOF remained competent to revoke the approval with respect to the MGO so long as the defendants failed to carry out the Prolayar scheme as approved. That argument may hold only if the approval of the MGO was made conditional upon the defendants implementing the Prolayar scheme. But a perusal of the approval (see the 3rd letter, *supra*) clearly indicates this was not so. Paragraph 2 of the letter states clearly that the Minister had approved the MGO to be followed by ('diikuti dengan' emphasis added) the implementation of the Prolayar scheme. The approval was such that it would be quite in order and permissible for the defendants to undertake the MGO first before proceeding to implement the Prolayar scheme. Had that been carried out the whole acquisition exercise would have been achieved to the letter of the law.

A decision made while the decision maker is *functus officio* is liable to be reviewed for substantive *ultra vires* on the principle described earlier, the effect of which would render the decision a non decision.

Application Of Public Law Remedy In A Collateral Proceeding

In applying public law principles to the issues at hand I am not unmindful of the fact that in the normal course a challenge on an administrative decision is normally made by a public law action for judicial review where the decision itself may be quashed by the court. But an administrative act may be impeached in the course of a collateral proceeding, where its impropriety is quite obvious as in the instant case.

Thus if a contract is based on an unlawful exercise of power, the courts will treat that contract as void (*Credit Suisse v. Allerdale Borough Council* [1996] 4 All ER 129). Similarly, in a criminal proceeding the accused is entitled to raise as a defence as of right the invalidity of an administrative act or measure for which he is charged with for violating and would be entitled to an acquittal if he establishes on a balance of probabilities, that act to be invalid (*Boddington v. British Transport Police* [1998] 2 All ER 203). (See *Halsbury's Laws of England* 2001 Reissue, para. 26 footnote 3).

Consequence Of Invalidity

The invalidity of Bank Negara's action had the effect of leaving the approval of the MOF of 17 October 1997 (the 3rd letter) intact and subsisting, leaving the defendants' obligation under the Prolayar scheme unperformed and outstanding; and assuming that Bank Negara had the capacity to act for the MOF by that letter to revoke his earlier approval of 17 October 1997, the revocation itself was invalid for Wednesbury unreasonableness.

In both the instances therefore, the defendants would not be able to rely on the defence that they were prohibited under BAFIA to make the MGO of the plaintiffs' 5.01% shareholding as approved by the SC on 19 April 1996.

Disapproval Of The MOF Not A Defence

But even assuming that the MOF's prohibition was perfectly valid, having elected to acquire the 60.35% shareholdings of the UMBC shares from the UMBC group, the defendants would not be protected from having to perform their statutory obligation to the plaintiffs under the SCA.

The prohibition imposed by the MOF on the defendants from acquiring any additional shares of UMBC, even if valid, had in fact left them with a Hobson's choice – either to forestall the acquisition altogether or to seek exemption from the SC from having to undertake the MGO.

Having failed to obtain the exemption from the SC the defendants were at liberty not to proceed to acquire the shares. But once the defendants acquired them they assumed an obligation to undertake the MGO and a failure to do so constitutes an actionable wrong exposing them to civil liability under the SCA.

BAFIA only serves to prohibit the defendants from undertaking the MGO. It would not provide them with a statutory defence from any civil liability under the SCA arising from their failure to undertake the MGO should they proceeded with the acquisition.

To claim absolute immunity from any liability, there must exist in that Act or for that matter in any law, a provision in clear terms exempting them from any such liability.

The law on this point is well illustrated by the case of *Karuppan Bhoomidas v. Port of Singapore Authority* [1978] 1 MLJ 49. Under By-Law 26 made under the Straits Settlements Port Ordinance 1912, all stevedores of the Singapore Port Authority employed in discharging and loading cargoes from vessels were placed under the absolute superintendence of the ship's officers. The Privy Council found that the provision of the By-Law was insufficient to

displace the responsibility for the death of the port's stevedore on to the shoulders of the shipowner who had employed him, in spite of the provision in the By-Law stating clearly that the Port undertakes no responsibility for the stevedores. This was what Lord Salmon delivering the decision of the Board said at p. 51 H of the report:

> Had it been the intention of By-Law 26 to shift the *prima facie* responsibility of the respondent for the negligence of servants engaged and paid by them on to the shoulders of the shipowners, nothing would have been easier than to do so in plain words. This indeed was done in section 97B of the Port of Singapore Authority Act as amended in 1971 – which is strikingly different from By-Law 26. That section reads as follows:
>
> > Any stevedore or workman whilst engaged in performing work in or in respect of any vessel shall, notwithstanding that his wage or remuneration for performing the said work is paid by the Authority, be deemed to be the servant of the owner and master of such vessel and the Authority shall be exempted from all liabilities for any loss or damage caused by any act, omission or default of such stevedore or workman.

The Order

There shall be an order in term of prayer (1) and in consequence thereof, an order that the defendants do pay the plaintiffs damages to be assessed and costs.